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Supreme Court of the United States,

OCTOBER TERM, 1905.

No. 24.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Appellant,

versus

INTERSTATE COMMERCE COMMISSION,

Respondent,

INTERSTATE COMMERCE COMMISSION,

Appellant,

versus

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY *et al.*,

Respondents.

BRIEF FOR NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

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NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *et al.*,

Respondents.

Brief for New York, New Haven and Hartford Railroad Company.

THE PLEADINGS.

This is a suit brought by the Interstate Commission against the two defendants under the third section of the Act entitled "An Act to further regulate commerce with foreign nations and among

the States," approved February 19, 1903. By that section it is provided:

> "That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the Circuit Court of the United States sitting in equity having jurisdiction."

In order to understand the exact nature of the issue it is necessary to examine carefully the allegations of the petition.

It alleges that the Chesapeake and Ohio Railway Company "is engaged in carrying freight traffic between the Kanawha District in West Virginia and Newport News in Virginia at less than its published rates on file, and is committing a discrimination forbidden by law."

The facts justifying this general allegation are stated as follows:

> "Petitioner states and charges that during the spring of 1903 the Chesepeake and Ohio Railway Company made a contract *to carry* a large amount of coal, to wit, sixty thousand (60,000) tons, from the Kanawha District of West Virginia to tidewater at Newport News, in the State of Virginia, *for shipment to New Haven for the New York, New Haven and Hartford Railroad Company*, for which said traffic the Chesapeake and Ohio Railway Company would realize for carrying the same from twenty ($.20) to sixty ($.60) cents per ton. At least, petitioner is informed and believes that the rate the Chesapeake and Ohio Railway Company will receive on this traffic, or is receiving on the

same, is far below $1.45 per ton, its published rate for carrying coal from the Kanawha District of West Virginia to tidewater, at Newport News, Virginia, for shipment beyond the capes of the Chesapeake.

"Petitioner further states that it is informed and believes that the Chesapeake and Ohio Railway Company is now engaged in carrying the 60,000 tons of coal aforesaid, and that out of that amount it has already carried and delivered at least 25,000 tons, *at a rate far below its published rate* aforesaid.

"Petitioner further says that it is informed and believes that the Chesapeake and Ohio Railway Company undertakes to justify its action in the premises on the ground that in 1896 a contract was made by the Chesapeake and Ohio Railway Company with the New York, New Haven and Hartford Railroad Company, by which the former sold and agreed to deliver to the latter two millions of tons of best quality of coal on or before the 1st day of July, 1902, delivery to begin July 1st, 1897, and not to exceed 400,000 tons per annum. The price to be paid by the New York, New Haven and Hartford Railroad Company to the Chesapeake and Ohio Railway Company for this coal was two dollars and seventy-five cents ($2.75) per ton on the New Haven basis.

"Petitioner says that it is informed and believes that during the life of this contract, up to and including the month of June, 1902 (after which time deliveries ceased), the Chesapeake and Ohio Railway Company had failed to deliver about 60,000 tons of coal, required by the contract aforesaid.

"Petitioner further says that it is informed and believes that this contract was illegal and void, and that the Chesapeake and Ohio Rail-

way Company had no power to make such a contract, and that the contract for this coal was at such a price that *the freight rate thereon to be received by the Chesapeake and Ohio Railway Company* during a considerable period covered by the contract, *was far below its published rates.*

"Petitioner further says that it is informed and believes that some months after the contract aforesaid had expired, the New York, New Haven and Hartford Railroad Company rendered a bill to the Chesapeake and Ohio Railway Company for something over one hundred thousand ($100,000) dollars damages for failure to deliver the coal called for by the contract aforesaid, and during the winter of 1902–'03 the President of the Chesapeake and Ohio Railway Company arranged, through a coal broker by name Wittenburg, and a coal operator in the Kanawha District by name Thomas, by which it was agreed that Thomas should ship 60,000 tons of coal from the Kanawha District to the New York, New Haven and Hartford Railroad Company, at $2.75 per ton, said coal to be delivered prior to July 31st, 1903."

After setting forth these facts the petition continues:

"The petitioner is informed, believes and charges that the Chesapeake and Ohio Railway Company in this transaction is *engaged* in the *carriage of freight traffic* between the points set forth above, at *less than its published rates on file*, and is committing a discrimination against all other coal produced in the Kanawha District of West Virginia, which said discrimination is forbidden by law."

The petition prays:

1st. That the defendants may answer.

2d. That the Court will enforce an observance on the part of the Chesapeake and Ohio Railway Company of its published tariffs in respect to coal, &c.

3d. That the New York, New Haven and Hartford Railroad Company be enjoined and restrained from accepting or receiving any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce carried for it.

4th. That the Chesapeake and Ohio Railway Company be enjoined from doing anything whatever whereby coal or any other property shall, by any device whatever, be transported by it at a less rate than that named in the tariff published and filed by such carrier, or whereby any other advantage may be given or discrimination practiced.

The defendants answered separately. The answers set up substantially the same facts, and those facts are established by the proofs, and are also substantially found by the Court to be true, as stated in the answers.

STATEMENT OF FACTS.

The Chesapeake and Ohio Railway Company is a corporation of Virginia, operating a railroad extending through West Virginia and Virginia, terminating at Newport News. The New York, New Haven and Hartford Railroad Company is a corporation of Connecticut, operating a railroad extending through the States of Connecticut, Rhode Island and Massachusetts.

On December 3, 1896, these two companies en-

tered into a contract whereby the Chesapeake and Ohio agreed to furnish to the New York, New Haven and Hartford, not to exceed two million gross tons of bituminous coal from its line, in such quantities monthly as wanted from July 1, 1897, to July 1, 1902, and further agreed to deliver all said coal to the New York, New Haven and Hartford in its bins at such ports upon its line as required by monthly requisitions of its purchasing agent.

The New York, New Haven and Hartford agreed to pay for said coal at the rate of $2.75 per gross ton, New Haven basis, settlement to be made monthly (Case, pp. 6, 207).

Attached to the contract is a guarantee by J. Pierpont Morgan that the Chesapeake and Ohio shall not fail to deliver coal on account of strikes.

The Chesapeake and Ohio entered upon the performance of this contract, and annually made deliveries of the quantities of coal called for, rendered its bills for the same at the contract price, and was in due course paid for the same.

During the winter of 1900-'01 the Chesapeake and Ohio, by reason of strikes, were unable to make delivery of the full quantity of coal due under the contract for that year, and the New York, New Haven and Hartford was compelled to, and did, supply itself with large quantities of coal from other sources to make up said deficiency, for which it had to pay, and did pay, a greater price than that fixed by the contract. Thus, a just and legal claim for damages and reimbursement arose in favor of the New York, New Haven and Hartford against the Chesapeake and Ohio to the amount of $160,000, which claim was recognized and admitted by the Chesapeake and Ohio, and was settled and compromised by it by the payment of $130,000 in cash.

Again, in the year 1902, a general strike of coal miners paralyzed the coal industry, restricted the supply of coal, and enhanced enormously its price,

so that the Chesapeake and Ohio was unable to fully deliver the 400,000 tons of coal required for the last year of the term of the contract.

Again the New York, New Haven and Hartford had to go into the open market and buy coal for its purposes at a price greatly in excess of the contract, whereby another bill of damages was run up, amounting to $103,910.69, which represented the pecuniary loss sustained by it by reason of the failure of the Chesapeake and Ohio to deliver the full amount of coal due upon the last year of the contract. The number of tons of shortage for that year was 59,966.

The New York, New Haven and Hartford made claim upon the Chesapeake and Ohio for reimbursement for the said sum of $103,910.69, and the Chesapeake and Ohio, not denying its legal obligation under the contract and admitting its liability to make good the loss, especially in view of the guarantee attached to the contract, entered into negotiation with the New York, New Haven and Hartford for a settlement of the claim, and an agreement of settlement was arrived at, whereby, on account of the hardship of the case and because the non-performance of the contract was not due to the fault of the Chesapeake and Ohio, but to a condition of affairs over which it had no control, the New York, New Haven and Hartford agreed, instead of insisting upon the payment of the money damages, to accept in satisfaction thereof the delivery of the deficiency of 59,966 tons of coal at the same price named in the contract. When this complaint was filed the Chesapeake and Ohio was engaged in the performance of this compromise agreement and had delivered thereunder 33,915 tons, leaving 26,051 tons of the deficiency still to be delivered. It is the delivery of this balance of tonnage which the Interstate Commerce Commission seeks to enjoin and prevent.

The New York, New Haven and Hartford had no knowledge of or interest in the cost of the coal

at the mines, nor the cost or rate of transportation over the road of the Chesapeake and Ohio or from Newport News to New England by water.

POINTS.

I.

The learned Judge of the Circuit Court correctly found and decided that the Chesapeake and Ohio was, in fact, the vendor of the coal and must be treated as a carrier which purchased coal at its mines on its road for delivery to a purchaser in New England.

II.

The Circuit Judge also correctly found and decided that the contract between the two companies was made in good faith; that there was no intention to violate or evade the provisions of the Interstate Commerce Act, and especially that there was no intention to carry at less than the published rates.

III.

The Circuit Court also correctly found and decided that the provisions of neither the second nor the sixth sections of the Interstate Commerce Act had been violated. The Court held that unless the transaction was a ruse or device to carry at less than legal rates, or unless there was, directly or indirectly, a carriage at too low a rate, the provisions

of the second section did not apply, and that the loss suffered by the C. and O. on the contract could not be treated as carriage at too low a rate, as that would be to assert that the honest loss of the vendor-carrier must be treated as a reduction in freight rates, and not as dealer's loss, which would be incorrect.

IV.

The Court below erred in holding that the railroad companies, especially the N. Y., N. H. and H. R. R. Co., were violating the third section of the Interstate Commerce Act.

(*a*). Because the complaint, neither in express terms nor by just legal inference, alleged any violation of Section 3.

(*b*). Because, irrespective of the sufficiency of the complaint, the transactions in question did not constitute a violation of Section 3.

This is not a case of shipper and carrier, but of vendor and vendee. The contract is to sell and deliver. Carriage is merely incidental to the contract of sale, and not the principal obligation of the vendor. Transportation is necessary merely in order to deliver the articles sold into the hands of the buyer.

It was not the purpose and is not within the fair scope of the Interstate Commerce Act to hold that merely incidental carriage performed, not as a part of the transportation business, but as the part of the business of a dealer, is governed by the Act, where the transaction is honest and not intended as a ruse or device to defeat the statute and give undue or unreasonable preference or advantages to some particular person.

If Congress had intended to make the Commerce Act as broad and far-reaching as this, it would have used apt terms to express such an intention. The proper construction of the statue is that it applies to transportation as such when undertaken by a common carrier, exercising the functions of a carrier, and dealing, not with a vendee, but with a shipper of goods.

V.

Even if the arrangement did give an advantage to the N. Y., N. H. & H. R. R. Co., it was not, under the circumstances disclosed in the record, an undue or unreasonable advantage.

The contract of December 3, 1896, was not only made in good faith, but was intended to benefit generally all the producers of coal in the regions reached by the C. & O. The transaction was open and public, unobjected to for more than the full period of five years, and is objected to now only with reference to a very small proportion of the quantity of coal contracted to be furnished by the C. & O. to the N. Y., N. H. & H. The contract worked no injury to any shipper of coal.

VI.

The decision of the Circuit Court accords to the vendor in this case the right to cease to perform its contract of sale, made in good faith, whenever the cost of the article, or the other cost items, go to such a point that the contract price does not equal, or practically equal, the cost items and the carrier's published freight rates.

It is submitted that this is an extension by con-

struction of the Interstate Commerce Act, which is unjustified, unnecessary and impolitic.

The cases cited by the learned Judge as analogous are all cases where the contracts voluntarily abrogated by the carriers were contracts relating exclusively to transportation, and were made between the carrier and shippers of goods, not between the carrier and vendees.

The decree of the Court below, which practically forbids the N. Y., N. H. & H. from recovering damages on a contract of purchase honestly entered into, merely because it incidentally and collaterally may affect some shippers of coal on the line of the C. & O., is inequitable and unjust, and should be reversed and the complaint dismissed.

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